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No. 08-547

Supreme Court, U.S.
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In The Supreme Court of the United States

ELAINE WEBB-EDWARDS,

Petitioner,

v.

KEVIN BEARY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF ORANGE COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner has presented a compelling reason for certiorari in this case given that the Eleventh Circuit's decision does not conflict with either this Court's precedent or the decisions of other circuit courts.

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STATEMENT OF THE CASE

In this case, Petitioner Elaine Webb-Edwards ("Webb-Edwards") sued Kevin Beary in his official capacity as the Sheriff of Orange County, Florida ("Beary"). Webb-Edwards asserts that Beary violated Title VII of the Civil Rights Act of 1964 by failing to appoint her to the position of School Resource Officer ("SRO") at Gateway Middle School because of her gender.

After the jury rendered a verdict in her favor, the district court granted Beary's motion for judgment as a matter of law pursuant to Rule 50(a), and the Eleventh Circuit affirmed. App. 45-65; App. 1-41. In ruling in Beary's favor, both the district court and the Eleventh Circuit held that Webb-Edwards had not presented sufficient evidence from which a reasonable jury could find that she had suffered an adverse employment action emanating from the failure to appoint her to an SRO position at Gateway Middle School. App. 35-40, 52-53.

As of the date of her application for an SRO position on August 4, 2004, Webb-Edwards had been working as a property detective for the Sheriff's office. App. 52. Notably, in applying for appointment as an SRO, Webb-Edwards openly admits that she was not applying for a particular position at a specific school. App. 37, 52; Record 84, pp. 69:11-70:8,

92:24-93:10, 116:7-15.[1] Rather, per the department's policy, an officer who successfully completed the SRO review process could be appointed to an available position at any school. Record 84, pp. 69:16-70:8, 116:7-15.

Following an interview by a three-member panel, Webb-Edwards was placed second on the list of officers eligible for appointment to an SRO position, a list which was valid for four months. Record 84, pp. 41:15-19, 42:12-16, 43:16-44:7, 78:10-80:23, 125-9-126:18. After the first officer on the list was appointed to an opening at Piedmont Lakes Middle School, a subsequent opening became available at Gateway Middle School. App. 11. Webb-Edwards was not selected for the Gateway Middle School SRO position, due to the decision-maker's desire for a larger, more physically-imposing officer to staff the position at that school. App. 16-19; Record 84, pp. 42:24-43:1, 74:9-16, 107:25-108:12, 112:22-113:10, 118:12-119:10, 120:22-121:23, 133:10-17, 139:24-140:11, 141:20-142:15, 143:5-9, 152:21-153:17, 166:1-15.

As the Eleventh Circuit emphasized, Webb-Edwards' interest in becoming an SRO centered around her desire to teach, advise and counsel students, as well as her desire to participate in academic and extracurricular activities. App. 22, 39.

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[1] Citations to the Record are to the appropriate docket entry followed by the appropriate page and line designations. Docket entry 84 corresponds to day one of the trial transcript, while docket entry 85 corresponds to day two of the trial transcript.

Significantly, the facts in this case are undisputed that the atmosphere at Gateway Middle School precluded any teaching activities as the SRO's time is spent "going from classroom to classroom or breaking up a fight in the hallway or assisting in the office with a student that [has] acted out[.]" App. 14, 37. The SRO at Gateway Middle School is also substantially more likely to be subject to violent or threatening behavior. App. 17-18, 37-38. Gateway's unique challenges in this respect are a result of the fact that the school is the district's "final step for students with severe behavioral problems" who are not "able to function safely in a regular environment." App. 17. The students at the middle school range in age from 12 to 22. App. 16-17. The majority have criminal histories as well as psychological or behavioral problems. App. 15, 17. The majority are also on medication and have been diagnosed with clinical depression. App. 15.

On November 9, 2004 at 2:23 p.m., approximately fifteen days after being formally advised that she had not been appointed to the Gateway position, Webb-Edwards sent an e-mail to Human Resources Director Daniel Ford advising of her intention to resign from the department, effective December 31, 2004. App. 39; Record 84, pp. 47:6-8, 50:6-22, 81:6-17, 77:19-21, 79:1-21.

Within three hours after Webb-Edwards' e-mail, another SRO position vacancy, this one at Conway Middle School, was confirmed and orally offered to

Webb-Edwards. Record 84, pp. 130:13-131:3, 163:11-18, 164:7-10; Record 85, pp. 72:5-74:9.

In contrast to Gateway, the environment at Conway Middle School would have enabled Webb-Edwards to participate in those activities that she sought when applying for an SRO position. App. 39. At Conway, the SRO had "an opportunity to make a difference through counseling, mentoring, teaching, coaching, [and] doing all the after-school activities." App. 18-19, 38. "It's a very positive place to be as opposed to Gateway[,] which is controlled chaos." App. 19.

Notwithstanding, Webb-Edwards testified that the Conway offer was "too little too late." App. 20. She further advised that Director Ford would have to speak to her attorney on the matter. App. 15. Consequently, she rejected the Conway Middle School SRO position and elected to resign. Record 84, pp. 55:6-14, 82:12-18, 100:21-101:13; Record 85, pp. 75:24-76:14, 77:15-21.

The facts are undisputed that both SRO positions offered the same exact pay and benefits, which was also identical to the pay and benefits Webb-Edwards earned as a property detective. Record 84, pp. 91:13-92:20, 119:11-120:1, 164:11-14. Moreover, serving as a property detective involved an occasional encounter with a perpetrator resisting arrest. App. 39. In contrast, the Gateway SRO position involved the daily threat of being physically assaulted. App. 39.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 states that a petition for writ of certiorari "will be granted only for compelling reasons." In the present case, Webb-Edwards' petition presents no compelling reason for this Court to grant a writ of certiorari. Rather, notwithstanding her strained efforts to assign a new legal standard to the Eleventh Circuit, in reality Webb-Edwards merely contends, erroneously, that the circuit court misapplied a properly stated rule of law. In accordance with the considerations enunciated in Rule 10, Beary contends that the petition should be denied.

I. The Eleventh Circuit's adverse personnel action analysis is consistent with this Court's precedent.

After a thorough and painstaking analysis of the applicable legal standards and the record evidence viewed in the light most favorable to Webb-Edwards, the Eleventh Circuit correctly concluded that the failure of Webb-Edwards to be appointed to the SRO position at Gateway Middle School did not constitute an actionable adverse personnel action under the circumstances of this case.

Webb-Edwards' petition is premised upon the mistaken view that, in so holding, the Eleventh Circuit formulated a new standard incompatible with this Court's precedent and at odds with the decisions of other circuits. Contrary to Webb-Edwards' argument, nowhere in its decision does the Eleventh

Circuit purport to enunciate a new legal test. Rather, the court expressly applies the undisputed facts of this case to the standards previously articulated by this Court and its own.

In reaching their decisions, there can be little doubt that both the district court and the circuit court commenced its review with the appropriate legal standard, articulating the familiar *prima facie* framework employed in Title VII cases. To prevail on her claim, Webb-Edwards was required to prove (1) that she was a member of a protected class, (2) that she was qualified for the job, (3) that she suffered an adverse employment action, and (4) that she was displaced by someone outside the protected class. App. 35.

The decisions of the district and circuit courts in this case focused on the existence, or lack thereof, of the adverse employment action element. In the petition, Webb-Edwards repeatedly confuses this element with the existence of discriminatory animus, which was presumed by the lower courts.

Quoting this Court's decision in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L. Ed. 2d 633 (1998), the Eleventh Circuit began its analysis by noting, "[a] tangible employment action constitutes significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." Elaborating on this standard as

applied to discrimination claims, the circuit court quoted from its 2001 holding in *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1239, stating:

> [T]o prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a serious and material change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significant adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.

Applying this standard, the court held that a reasonable jury could not have concluded that Webb-Edwards' failure to receive a lateral transfer to the Gateway SRO position constituted adverse employment action under the facts of this case. In reaching this result, the circuit court began with the fact that a transfer to the Gateway position from her position of property detective would not have resulted in any changes in Webb-Edwards' pay or benefits. The court further noted that applicants for SRO positions, including Webb-Edwards, did not apply for a position at a particular school, nor were they guaranteed a position in a particular school. Rather, even where, as here, the applicant successfully completed the review process, he or she nevertheless could be appointed to any open SRO position. Given the uncontroverted record evidence establishing that Webb-Edwards was offered an SRO position at Conway Middle School immediately after the human resources director was

advised that she had been bypassed for the Gateway position, the determination that Webb-Edwards had not been subject to adverse personnel action was clearly proper.

Perhaps most importantly, the circuit court also emphasized the undisputed fact establishing that Webb-Edwards' motivation in applying for an SRO position was her stated desire to teach, counsel and coach children and to participate in a school's academic and extracurricular activities. Given that it was equally undisputed that the position at Gateway precluded participation in these activities due to the unique nature of its student population, no reasonable jury could conclude that Webb-Edwards had suffered adverse employment action by failing to obtain the Gateway position.

Finally, the circuit court also contrasted the fact the Gateway SRO position exposed the officer holding that position to the daily threat of assault, while the property detective position was exposed to an occasional perpetrator resisting arrest. In making this contrast, the court was not articulating a new standard in which the adverse employment action analysis was dependent upon a threat of harm. Rather, the court was further buttressing its conclusion that, if anything, appointment to the Gateway SRO position would have been viewed by a reasonable jury as more adverse than being denied the position.

Nonetheless, throughout her petition and in an attempt to conjure a conflict of precedent where none

exists, Webb-Edwards conflates the Eleventh Circuit's adverse action analysis with cases focusing on the existence of discriminatory animus in the first instance. As Webb-Edwards notes, however, the Eleventh Circuit in this case assumed that sufficient evidence of discriminatory animus existed. Even where a discriminatory motive is established, however, a litigant is still required to prove that he or she suffered adverse employment action. 42 U.S.C. §2000e-2(a)(1); *see, e.g.*, *Grimsley v. Marshalls of MA, Inc.*, 284 Fed. Appx. 604, 608, 2008 WL 2435581 (11th Cir. June 17, 2008) (unpublished) ("In order to establish a disparate treatment race claim, a plaintiff must also show that an adverse employment action was taken against him regardless of whether he is relying on direct evidence of discrimination or employing the burden-shifting approach for cases in which only circumstantial evidence is available"); *Ballard v. Portland General Elec. Co.*, 2008 WL 3822317, at *1 (9th Cir. Aug. 11, 2008) (unpublished) ("[W]hether under a direct evidence approach or under the *McDonnell Douglas* approach, Ballard's claim fails because he did not suffer any adverse employment action").

In this respect, Webb-Edwards' reliance upon this Court's decisions in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L. Ed. 2d 786 (1977) and *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S.Ct. 1196, 113 L. Ed. 2d 158 (1991), is misplaced. Neither *Dothard* nor *Johnson Controls* involved an assessment of whether adverse employment action

had been established. Indeed, both *Dothard* and *Johnson Controls* involved failure to hire allegations, decisions which indisputably constitute adverse employment action for purposes of Title VII's anti-discrimination mandate.

As the circuit court's reference to safety in this case was merely one of several facts for consideration as to whether the failure to obtain the Gateway SRO position was adverse and was not a new legal standard articulated by the court, Webb-Edwards' petition should be denied.

II. The Eleventh Circuit's adverse personnel action analysis is consistent with the analysis used by other circuits.

In a further effort to create a conflict where none exists, Webb-Edwards next contends that the Eleventh Circuit's decision conflicts with decisions emanating from the Ninth, Tenth and the District of Columbia Circuits. Specifically, Webb-Edwards relies upon the decisions in *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997), *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004) and *Smith v. Sect'y of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981). A careful review of these decisions reveals that they are inapposite to the issues in the present case, however.

Both *Hashimoto* and *Hillig* involved an adverse employment action analysis stemming from retaliatory employment references provided to prospective

employers. In those cases, the courts took the position that, to establish actionable adverse action, a plaintiff need only establish that the discriminatory act caused "harm to future employment prospects" and that the plaintiff need not prove a particular job opportunity was lost. *Hillig*, 381 F.3d at 1032-33. Similarly, in *Smith* the court held that a plaintiff who was subjected to a discriminatory performance evaluation need not necessarily prove that the evaluation caused him to lose a specific job or promotion. While these points of law may be in conflict with other circuits, they are irrelevant to the present case.

In the present case, the Eleventh Circuit followed its previously-articulated test for adverse employment action, that the employee must prove a serious and material change in his or her terms, conditions or privileges of employment. The Eleventh Circuit did not comment upon the appropriate test for analyzing adverse action as it relates to future job prospects.

A review of case law from the Ninth, Tenth and District of Columbia Circuits arising under similar facts as are present in this case compels the conclusion that the Eleventh Circuit's articulated standard is consistent with the treatment of this issue by its sister circuits. *See, e.g., Ginger v. District of Columbia*, 527 F.3d 1340, 1343-44 (D.C. Cir. 2008), *reh'g en banc denied* (July 31, 2008), *pet. for cert. filed* (Oct. 29, 2008); *Sanchez v. Denver Public Schools*, 164 F.3d

527, 532 (10th Cir. 1998); *Davis v. Team Elec. Co.*, 520 F.3d 1080 (9th Cir. 2008).

In *Ginger*, the court analyzed the existence of adverse employment action in the context of a department reorganization causing changes in assignments and shifts. In making this assessment, the court articulated the appropriate inquiry in terms nearly identical to the standard applied by the Eleventh Circuit in this case, "employment action does not support a claim of discrimination unless it has 'materially adverse consequences affecting the terms, conditions or privileges of the plaintiff's employment such that a reasonable trier of fact could find objectively tangible harm.'" *Id.* at 1343 (quoting *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002)).

Similarly, the court in *Sanchez*, citing to this Court's language in *Ellerth* mandating a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits[,]" held that a teacher's transfer to a neighboring school did not constitute adverse employment action. *Sanchez*, 164 F.3d at 532.

In *Davis*, the Ninth Circuit, while noting that the assignment of more burdensome job responsibilities does constitute an adverse employment action, emphasized that "an adverse employment action is one that *materially affects* the compensation, terms,

conditions or privileges of employment." *Id.* at 1089 (emphasis supplied). Even in *Hillig*, relied upon by Webb-Edwards, the court noted that it requires the employer's conduct to be "materially adverse to the employee's job status[.]" *Id.* at 1033.

As is readily apparent from these cases, the standard articulated and applied by the district and circuit courts in this case is not a departure from the standards applied by other circuits in similar cases. Accordingly, Webb-Edwards' petition should be denied.

III. Neither the district court's nor the Eleventh Circuit's decisions invaded the province of the jury.

Finally, Webb-Edwards' also contends that certiorari is appropriate because the Eleventh Circuit's decision allegedly usurps the province of the jury contrary to this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L. Ed. 2d 105 (2000). Webb-Edwards' argument in this respect is without merit. As comprehensively discussed in the Eleventh Circuit's decision, the court did not merely second guess the jury's conclusions. To the contrary, it carefully reviewed the record evidence in the light most favorable to Webb-Edwards and determined that there was insufficient evidence establishing a necessary

element of her claim, *i.e.*, that she had suffered adverse employment action.

Here again, Webb-Edwards' argument is premised upon the erroneous assumption that she need not establish the element of adverse employment action since the courts presumed that she could establish the element of discriminatory animus. All of the evidence that Webb-Edwards cites as evidence of the lower courts' alleged error focuses on the element of discriminatory animus, not on the element of adverse employment action which was the issue on appeal.

With the issue properly framed, it is clear that the courts properly applied the record evidence of this case to the correct legal standard and concluded that no reasonable jury could find that Webb-Edwards' failure to receive an SRO appointment to Gateway constituted adverse employment action. Accordingly, both the district court and the Eleventh Circuit properly decided this case and, as such, the petition should be denied.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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